

STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Whitbeck, C.J., and Talbot and Murray, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. 130353

- vs -

BOBBY LYNELL SMITH,

Defendant-Appellee.

Court of Appeals No. 257353
Oakland County CC No. 2004-195521-FC

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED



MICHAEL J. MCCARTHY, P.C.
Michael J. McCarthy (P30169)
Attorney for Defendant-Appellee
26001 Five Mile Road
Redford, MI 48239
(313) 535-1300

TABLE OF CONTENTS

A.	Index of Authorities	Page ii
B.	Statement Regarding Jurisdiction	Page 1
C.	Counter Statement of Questions Presented	Page 2
D.	Counter Concise Statement of Material Proceedings and Facts	Page 3
E.	Standards of Review	Page 8
F.	Argument:	Page 9
	QUESTION NO. 1: THE TEST TO BE APPLIED IN MULTIPLE PUNISHMENT/DOUBLE JEOPARDY CASES IS THE SAME ELEMENTS TEST ANNOUNCED IN <i>BLOCKBURGER v UNITED STATES</i> .	Page 9
	QUESTION NO. 2: CONVICTIONS AND SENTENCES FOR FIRST DEGREE FELONY MURDER AND ARMED ROBBERY CONSTITUTED A VIOLATION OF THE GUARANTEE AGAINST DOUBLE JEOPARDY.	Page 23
G.	Relief Requested	Page 31

INDEX OF AUTHORITIES

CASES:

<i>Ashe v Swenson</i> , 97 US 436, 90 S Ct 1189, 25 L Ed2d 469 (1970)	p 18
<i>Benton v Maryland</i> , 395 US 784, 89 S Ct 2056, 23 L Ed2d 707 (1969)	pp 11,12,16 25
<i>Blockburger v United States</i> , 284 US 299, 52 S Ct 180, 76 LEd 306 (1932)	pp 1,7,12,13 14,15,16,17 18,22,27
<i>Brown v Ohio</i> , 432 US 161, 97 S Ct 2221, 53 L Ed2d 187 (1977)	p 17
<i>Burton v United States</i> , 202 US 344, 26 S Ct 688, 50 LEd 1057 (1906)	p 13
<i>Carter v McClaghry</i> , 183 US 367, 22 S Ct 181, 46 LEd 236 (1902)	p 13
<i>Gavireres v United States</i> , 220 US 338, 31 S Ct 421, 55 LEd 489 (1911)	pp 13,14,27
<i>Grady v Corbin</i> , 495 US 508, 110 S Ct 2084, 109 L Ed2d 548 (1990)	pp 15,18
<i>North Carolina v Pearce</i> , 395 US 711, 89 S Ct 2072, 2076, 23 L Ed2d 656 (1969)	pp 12,25
<i>People v Bigelow</i> , 229 Mich App 219, 581 NW2d 744 (1998)	p 27
<i>People v Curvan</i> , 473 Mich 896, 703 NW2d 400 (2005)	p 21
<i>People v Harding</i> , 443 Mich 693, 506 NW2d 482 (1993)	pp 8,10,21,28 29
<i>People v Lugo</i> , 214 Mich App 699, 542 NW2d 921 (1995)	p 8
<i>People v Nutt</i> , 469 Mich 565, 677 NW2d 1 (2004)	pp 1,10,11,18 19,22
<i>People v Passeno</i> , 195 Mich App 91, 489 NW2d 152 (1992)	p 27

<i>People v Robideau</i> , 419 Mich 458, 355 NW2d 592 (1984)	pp 1,7,16,17 27,28
<i>People v White</i> , 390 Mich 245, 212 NW2d 222 (1973)	p 18
<i>People v White</i> , 212 Mich App 298, 536 NW2d 876 (1995)	p 8
<i>People v Wilder</i> , 411 Mich 328, 303 NW2d 112 (1981)	pp 10,21
<i>United States v Dixon</i> , 509 US 688, 113 S Ct 2849, 125 LEd 2d 556 (1993)	pp 15,16,18 19,25
<i>Whalen v United States</i> , 445 US 684, 100 S Ct 1432, 63 L Ed2d 425 (1980)	pp 17,20

STATUTES:

MCLA 750.227b, MSA 28.424(2)	p 3
MCLA 750.316, MSA 28.548	pp 3,9,23,26 27
MCLA 750.317, MSA 28.549	pp 27,31
MCLA 750.529, MSA 28.797	pp 3,23

CONSTITUTIONS:

US Const, Am V (not Art V)	pp 10,11,19 20,24,25,29
Const 1963, Art 1 § 15	pp 1,10,11,19 20,25,29

STATEMENT REGARDING JURISDICTION

This matter is before this Honorable Court pursuant to the Order (32a) that it entered on May 30, 2006 granting the Plaintiff-Appellant's application for leave to appeal from an unpublished Per Curiam Opinion of the Court of Appeals issued on December 27, 2005. (Whitbeck, C.J., and Talbot and Murray, JJ.) (29a-31a) The Court of Appeals vacated the Appellee's two convictions for armed robbery and the two attendant convictions for felony firearm because those convictions violated double jeopardy protections. The Court of Appeals affirmed the Appellee's two convictions for first degree felony murder.

In its Order granting leave to appeal this Court directed the parties to address the following issues:

1. Whether the *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932) or *People v Robideau*, 419 Mich 458 (1984), sets forth the proper test to determine when "multiple punishments" are barred on double jeopardy grounds pursuant to Const 1963, art 1, § 15, taking into consideration this Court's prior precedent in "multiple punishment" claims and the common understanding of "same offense" as it relates to the "multiple punishments" prong of double jeopardy. Cf. *People v Nutt*, 469 Mich 565 (2004).
2. Whether defendant's convictions of armed robbery and felony-murder based on a predicate felony of larceny violated double jeopardy protections under either the *Blockburger* or *Robideau* test. (32a)

COUNTER STATEMENT OF QUESTIONS PRESENTED

QUESTION NO. 1: WHETHER *BLOCKBURGER v UNITED STATES*, 284 US 299, 52 S CT 180, 76 L ED 306 (1932) OR *PEOPLE V ROBIDEAU*, 419 MICH 458, 355 NW2D 592 (1984), SETS FORTH THE PROPER TEST TO DETERMINE WHEN MULTIPLE PUNISHMENTS ARE BARRED ON DOUBLE JEOPARDY GROUNDS PURSUANT TO ARTICLE 1, SECTION 15 OF THE MICHIGAN CONSTITUTION OF 1963?

PLAINTIFF-APPELLANT'S ANSWER:

The People contend that, for the most part, *People v Robideau* sets forth the proper test but that the elements of the respective offenses, as discussed in *Blockburger v United States*, should be considered in assessing whether offenses are the same.

DEFENDANT-APPELLEE'S ANSWER:

The test set forth in *Blockburger v United States* controls this issue.

TRIAL COURT'S ANSWER:

The trial court did not address this question.

COURT OF APPEALS' ANSWER:

The Court of Appeals did not address this question.

QUESTION NO. 2: DID THE DEFENDANT-APPELLEE'S CONVICTIONS AND SENTENCES FOR TWO COUNTS OF FIRST DEGREE FELONY MURDER AND FOR TWO COUNTS OF ARMED ROBBERY CONSTITUTE A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE DOUBLE JEOPARDY CLAUSE OF ARTICLE 1, SECTION 15 OF THE MICHIGAN CONSTITUTION?

PLAINTIFF-APPELLANT'S ANSWER: NO

DEFENDANT-APPELLEE'S ANSWER: YES

TRIAL COURT'S ANSWER: NO

COURT OF APPEALS' ANSWER: YES

MICHAEL J.
ARTHUR, P.C.
FIVE MILE ROAD
D. MICHIGAN 48239
TELEPHONE
13) 535-1300
FAX
13) 535-4580

COUNTER CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On June 26, 2004 the Defendant-Appellee, BOBBY LYNELL SMITH, was found guilty of two counts of first degree felony murder, contrary to MCLA 750.316(1)(b), two counts of armed robbery, contrary to MCLA 750.529, and four counts of possession of a firearm in the commission of a felony, contrary to MCLA 750.227b, following a five day jury trial conducted in the Oakland County Circuit Court. (29a)

The prosecution's theory of the defendant's guilt was to the effect that during the morning hours of January 7, 2003 he entered the City Tire Store on Perry Street in Pontiac, Michigan where he attempted to rob an employee of the store, Stephen Putman. (4b) The assistant prosecutor who tried the case told the jury that the defendant then shot Mr. Putman with a .38 caliber revolver. (4b) He theorized that the defendant then demanded money from the store owner, Richard Cummings, at gunpoint. (5b) He stated that Mr. Cummings tried to resist and that he threw a heavy object at the defendant striking him in the hand. (6b) He said that the defendant then fatally shot Mr. Cummings in the head two times. (6b)

During his opening statement the assistant prosecutor told the jury that the defendant "...was attempting to steal when he committed the murders." (9b) He explained the armed robbery charge as "...basically is that he committed a robbery with a gun." (9b) He told the jury that the motive for the killings was

to enable the defendant to finish the robbery of the two men.
(7b)

Gary Putman testified that Stephen Putman was his son and that Richard Cummings had been his friend since boyhood. (10b) He stated that Mr. Cummings always carried at least \$200.00 in cash in his front pants pocket and that he did not keep his cash in his wallet. He said that his son always carried a wallet in his back pocket. (16a) He said that he never recovered his son's wallet following his death. (16a)

Cynthia Cummings testified that Richard Cummings had been her husband for over thirty seven years. (12b) She stated that he owned the City Tire Store and had worked there for forty years. (12b) She said that he always carried between \$400.00 and \$600.00 in his pants pocket. (13b) She stated that he carried a wallet with either a twenty dollar bill or a one hundred dollar bill in it. (11b) She said that on January 7, 2003 her husband left their home for work at 8:30 a.m. She said that he took his briefcase, which contained an envelope full of cash for making change, with him. (17a) She said that there was a cash drawer in the front counter of the business where her husband conducted cash transactions with customers. (18a) She said that her husband also took a keyring holding the keys to the City Tire Store with him when he left the house on January 7, 2003. (17a) She said that, after her husband's death, she never recovered those keys. (19a)

Tywanda Smith testified that she is the wife of the defendant. (14b) She said that he told her that he had committed

MICHAEL J.
JARTHY, P.C.
FIVE MILE ROAD
D, MICHIGAN 48239
TELEPHONE
13) 535-1300
FAX
13) 535-4580

the murders at the City Tire Store. (15b) She said that he told her that he shot the young man first, then the old man; that he said that the old man hit his hand with something; that he shot the old man two times. (15-16b) She said that the defendant told her that he took money and keys from the store; that he cleaned up before he left and that he threw the gun in the river. (15-16b) She said that the defendant told her that he left the store by the back door. (16b)

Clifford Cummings testified that Richard Cummings was his father. (17b) He said that he had worked at City Tire Store for fifteen years. (17b) He said that his father and he each had a set of keys to that business. (18b) He said that he looked everywhere in the store for his father's keys after his death but that he never found them. (20b) He said that he had to change all of the locks at the business. (20b) He said that he also discovered that the movement sensors, part of the security alarm system, had been removed and discarded. (18-20b)

Off. Sennel Threlkeld of the Pontiac Police Department testified that he was the lead crime scene officer assigned to the City Tire Store murder investigation. (21b) He stated that there was no sign of a forced entry into the business. (21b) He said that he did not recover a wallet or any cash from the body of Richard Cummings. (21a) He said that he did not recover a wallet from Stephen Putman. (21a) He said that he did not find any keys to the business. (22b)

Closing arguments were presented on July 26, 2004. In

summation the assistant prosecutor said that the armed robbery charges had been proven because the defendant admitted that he took the keys and the money. He said that the larceny element of the felony murder charge had been proven as follows:

MR. FRAZEE: Now larceny is a legal term for stealing. So, if he was either stealing or attempting to steal at the time he killed these two men, which we have shown, he is guilty of both counts of Felony Murder. (23b)

On August 11, 2004 the defendant was sentenced to serve his natural life in prison without parole pursuant to the two convictions for first degree felony murder. (24b) He received two sentences of from seventeen and one half years to fifty years pursuant to the two convictions for armed robbery. (24b) Those sentences are all concurrent to one another but consecutive to the two year sentence imposed for the four convictions for possession of a firearm in the commission of a felony. (24b)

The defendant appealed his convictions and sentences as of right. In the Court of Appeals he argued, inter alia, that his convictions for two counts of felony murder and for the two counts of armed robbery committed during the course of the murders constituted a violation of his guarantee against double jeopardy. The Court of Appeals agreed. On December 27, 2005 it issued an unpublished Per Curiam Opinion in which it affirmed the two felony murder convictions and the two attendant convictions for felony firearm. However, the Court reversed the defendant's two convictions for armed robbery and his two convictions for the attendant felony firearm charges because they violated the

MICHAEL J.
DARTY, P.C.
FIVE MILE ROAD
D, MICHIGAN 48239
TELEPHONE
13) 535-1300
FAX
13) 535-4580

Michigan Constitution's guarantee against multiple punishments for the same offense. (29-31a)

The People filed an application for leave to appeal the Court of Appeals' decision that had reversed the appellee's convictions and sentences for two counts of armed robbery and for two counts of felony firearm. On May 30, 2006 this Court issued an order in which it granted that application. (32a) The parties were directed to brief the question of whether *People v Robideau*, 419 Mich 458, 355 NW2d 592 (1984), or *Blockburger v United States*, 284 US 299, 52 S Ct 180, 76 LEd 306 (1932), set forth the proper test for determining whether multiple punishments are barred by Article 1, Section 15 of the Michigan Constitution of 1963 and whether the appellee's convictions and sentences for armed robbery and felony murder, based on a predicate felony of larceny, violated double jeopardy under either test. (32a)

STANDARDS OF REVIEW

QUESTION NO. 1:

A claim that the Double Jeopardy Clause has been violated presents a constitutional question. The standard of review for a constitutional question is *de novo*.

See *People v Nutt*, 469 Mich 565, 677 NW2d 1 (2004), *People v Harding*, 443 Mich 693, 506 NW2d 482 (1993), *People v Lugo*, 214 Mich App 699, 542 NW2d 921 (1995), and *People v White*, 212 Mich App 298, 536 NW2d 876 (1995).

QUESTION NO. 2:

A claim that the Double Jeopardy Clause has been violated presents a constitutional question. The standard of review for a constitutional question is *de novo*.

See *People v Nutt*, 469 Mich 565, 677 NW2d 1 (2004), *People v Harding*, 443 Mich 693, 506 NW2d 482 (1993), *People v Lugo*, 214 Mich App 699, 542 NW2d 921 (1995), and *People v White*, 212 Mich App 298, 536 NW2d 876 (1995).

ARGUMENT

QUESTION NO. 1: WHETHER *BLOCKBURGER v UNITED STATES*, 284 US 299, 52 S CT 180, 76 L ED 306 (1932) OR *PEOPLE V ROBIDEAU*, 419 MICH 458, 355 NW2D 592 (1984), SETS FORTH THE PROPER TEST TO DETERMINE WHEN MULTIPLE PUNISHMENTS ARE BARRED ON DOUBLE JEOPARDY GROUNDS PURSUANT TO ARTICLE 1, SECTION 15 OF THE MICHIGAN CONSTITUTION OF 1963?

PLAINTIFF-APPELLANT'S ANSWER:

The People contend that, for the most part, *People v Robideau* sets forth the proper test but that the elements of the respective offenses, as discussed in *Blockburger v United States*, should be considered in assessing whether offenses are the same.

DEFENDANT-APPELLEE'S ANSWER:

The test set forth in *Blockburger v United States* controls this issue.

TRIAL COURT'S ANSWER:

The trial court did not address this question.

COURT OF APPEALS' ANSWER:

The Court of Appeals did not address this question.

The factual situation presented in the case at bar which has given rise to a constitutional question regarding the double jeopardy guarantee against multiple punishments can be simply stated. The Defendant-Appellee, BOBBY LYNELL SMITH, was convicted of two counts of first degree felony murder, contrary to MCLA 750.316, for the deaths of two men, Richard Cummings and Stephen Putman, that occurred during the armed robbery of their tire store in Pontiac, Michigan on January 7, 2003. Each man was shot to death. Each, it was alleged, had been robbed.

However, the predicate felony employed by the prosecution in

presenting the felony murder charges was not armed robbery. It was larceny. By proceeding in that manner the prosecution then charged the defendant with two separate counts of armed robbery that were independent of the murder charges. The appellee submits that this device was employed specifically to avoid having the armed robbery convictions and sentences vacated on double jeopardy grounds pursuant to the holdings in *People v Wilder*, 411 Mich 328, 308 NW2d 112 (1981), and *People v Harding*, 443 Mich 693, 506 NW2d 482 (1993).

The question presented by this case is whether the appellee's right to be free from multiple punishments has been violated. This Court has asked what test should be employed in order to answer that question. This Court has also asked what impact, if any, its holding in *People v Nutt*, 469 Mich 565, 677 NW2d 1 (2004), should have upon that answer.

A. The law of double jeopardy in the United States:

The Fifth Amendment to the United States Constitution provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis added)

Article 1, Section 15 of the Michigan Constitution of 1963 provides, in relevant part, as follows:

No person shall be subject for the same offense to be twice put in jeopardy. (emphasis added)

The language employed in the Michigan Constitution of 1963 is identical to the core language of the Double Jeopardy Clause of the Fifth Amendment that was ratified as a part of the Bill of Rights in 1791. This similarity is significant to the evolution of the law of double jeopardy here in Michigan. See *People v Nutt*, supra, that will be discussed below. However, the double jeopardy protections of the Fifth Amendment have been enforceable against individual states of the Union as a matter of federal constitutional law for nearly forty years.

In *Benton v Maryland*, 395 US 784, 89 S Ct 2056, 23 L Ed2d 707 (1969), the United States Supreme Court held that criminal defendants prosecuted in state courts are entitled to the protections afforded by the United States Constitution. Justice Marshall wrote the opinion of the Court. He said:

Recently, however, this Court has 'increasingly looked to the specific guarantees of the (Bill of Rights) to determine whether a state criminal trial was conducted with due process of law.' *Washington v. Texas*, 388 U.S. 14, 18, 87 S.Ct. 1920, 1922, 18 L.Ed.2d 1019 (1967). In an increasing number of cases, the Court 'has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights***.'" *Malloy v. Hogan*, 378 U.S. 1, 10-11, 84 S.Ct. 1489, 1495, 12 L.Ed.2d 653 (1964). Only last Term we found that the right to trial by jury in criminal cases was 'fundamental to the American scheme of justice.' *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968), and held that the Sixth Amendment right to a jury trial was applicable to the States through the Fourteenth Amendment. For the same reasons, we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with

this holding, *Palko v. Connecticut* is overruled.

* * * * *

Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness.' Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' *Duncan v. Louisiana*, supra, at 149, 88 S.Ct., at 1447, the same constitutional standards apply against both the State and Federal Governments. *Palko's* roots had thus been cut away years ago. We today only recognize the inevitable.

(at pp 794-795
(emphasis added))

On the same date that *Benton v Maryland*, supra, was decided the Supreme Court also issued its opinion in *North Carolina v Pearce*, 395 US 711, 89 S Ct 2072, 23 L Ed2d 656 (1969). In that decision the Court outlined the scope of the protection against double jeopardy. It consists of three separate guarantees which protect defendants from:

1. A second prosecution for the same offense following an acquittal;
2. A second prosecution for the same offense following a conviction;
3. A second or subsequent punishment for the same offense.
(at p 717)

The problem presented here is basically a question of multiple punishments. However, given the fact that the defendant was also tried for the predicate felony of larceny as well as armed robbery there is a technical question regarding multiple prosecutions. In either case the question raised by this Court is what test is to be applied in order to determine whether a double jeopardy protection has been violated. The appellee submits that the law is clear on this question and that the *Blockburger* test

is the one that must be applied to multiple punishment situations as well as those involving multiple prosecutions.

In *Gavieres v United States*, 220 US 338, 31 S Ct 421, 55 LEd 489 (1911), the Supreme Court set forth the test to be applied in a multiple prosecution situation. There the defendant had been prosecuted and convicted for public drunkenness. Subsequently he was prosecuted for insulting a public official which charge was brought because of the same episode of drunkenness. The defendant appealed the second conviction on double jeopardy grounds.

The Supreme Court cited two of its prior decisions, in *Carter v McClaughry*, 183 US 367, 22 S Ct 181, 46 LEd 236 (1902), and *Burton v United States*, 202 US 344, 26 S Ct 688, 50 LEd 1057 (1906), as it pronounced the test to determine whether a double jeopardy violation for multiple prosecutions has occurred. It said:

Applying these principles, it is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment. In the second case it was necessary to aver and prove the insult to a public official or agent of the authorities, in his presence or in a writing addressed to him. Without such charge and proof there could have been no conviction in the second case. The requirement of *insult to a public official* was lacking in the first offense. Upon the charge, under the ordinance, it was necessary to show that the offense was committed in a public place, open to public view; the insult to a public official need only be in his presence or addressed to him in writing. Each offense required proof of a fact which the other did not. Consequently a conviction of one would not bar a prosecution for the other.

(at pp 343-344)
(emphasis added)

In *Blockburger v United States*, 284 US 299, 52 S Ct 180, 76 LEd 306 (1932), the double jeopardy issue involved multiple

punishments for what the defendant had argued was essentially the same conduct. The Court cited its prior holding in *Gavieres v United States*, supra, and applied the same test that had been applied there to a multiple prosecution situation to the multiple punishment case then before it. It said:

Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Gavieres v. United States*, 220 U. S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433: 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' Compare *Albrecht v. United States*, 273 U. S. 1, 11, 12, 47 S. Ct. 250, 71 L. Ed. 505, and cases there cited. Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed.
(at p 304) (emphasis added)

While the Court observed that the multiple punishments imposed upon the defendant for his multiple convictions appeared on their faces to be harsh it was not able to interfere with those sentences. It said:

The plain meaning of the provision is that each offense is subject to the penalty prescribed; and, if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction. Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.
(at p 305)

The *Blockburger same elements* test has been the controlling authority in multiple prosecution and punishment cases since it was pronounced in 1932 with the exception of a limited period during which the *same conduct test*, pursuant to *Grady v Corbin*, 495 US 508, 110 S Ct 2084, 109 L Ed2d 548 (1990), was being applied. That deviation from the *Blockburger* test was short lived.

In *United States v Dixon*, 509 US 688, 113 S Ct 2849, 125 L Ed2d 556 (1993), the Court overruled the holding in *Grady v Corbin*, supra, and reinstated the *Blockburger* test. Justice Scalia wrote the opinion of the Court. In setting the historical record of the law he said:

In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. See, e.g., *Brown v. Ohio*, 432 U.S. 161, 168-169, 97 S.Ct. 2221, 2226-2227, 53 L.Ed.2d 187 (1977); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) (multiple punishment); *Gavieres v. United States*, 220 U.S. 338, 342, 31 S.Ct. 421, 422, 55 L.Ed. 489 (1911) (successive prosecutions). The same-elements test, sometimes referred to as the "*Blockburger*" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution. (at p 696)

He then went on to state that the *same conduct* test was invalid as follows:

We have concluded, however, that *Grady* must be overruled. Unlike *Blockburger* analysis, whose definition of what prevents two crimes from being the "same offence," U.S. Const., Amdt. 5, has deep historical roots and has been

accepted in numerous precedents of this Court, *Grady* lacks constitutional roots. The "same-conduct" rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy. See, e.g., *Gavieres v. United States*, 220 U.S., at 345, 31 S.Ct., at 416 (in subsequent prosecution, "[w]hile it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other"). (at p 704)

The *Blockburger* same elements test is the test being applied by the federal courts today as the holding in *United States v Dixon*, supra, continues to control. Therefore it is uncontroverted that as a matter of federal double jeopardy jurisprudence that is the proper test to be applied to questions of multiple punishment. Finally, given the fact that the double jeopardy protections afforded by the Fifth Amendment to the United States Constitution are and have been enforceable against the individual states since 1969 when the Supreme Court issued its opinion in *Benton v Maryland*, supra, the *Blockburger* test must be applied here in Michigan.

B. The law of double jeopardy in Michigan:

In *People v Robideau*, 419 Mich 458, 355 NW2d 592 (1984), this Court reviewed the cases of four defendants who had been convicted of compound crimes where one of the elements of the crime had been the commission of a different offense during the commission of the principal charge. Specifically each defendant had been charged with first degree criminal sexual conduct where the aggravating factor that elevated that crime to a life offense was the commission of another capital crime, either armed robbery or kidnapping.

This Court rejected the *Blockburger* same elements test for compound crimes and put in its place a test of legislative intent. Justice Brickley wrote the majority opinion. He said:

Because *Blockburger* was developed to deal with situations where an identifiable single act falls under the coverage of two statutes, it is even less helpful when applied to a compound crime. In these crimes, the Legislature has intentionally converted what would normally be two discrete acts into one legislatively created "act."

The difficulties with the *Blockburger* test lead us to the conclusion that it should be abandoned. The United States Supreme Court has declared that it is but a test of statutory construction and not a principle of constitutional law. *Missouri v. Hunter, supra*. Indeed, it would be quite contrary to established principles of federalism for the United States Supreme Court to impose on the states the method by which they must interpret the actions of their own legislatures. We, therefore, find it within our power to reject the *Blockburger* test, preferring instead to use traditional means to determine the intent of the Legislature: the subject, language, and history of the statutes.

At times, this will be a difficult task. The Legislature rarely reveals its intentions with a specific statement. Yet the difficulty in determining the intent of the Legislature cannot be cause for furthering the use of a test which reveals little, if anything, about legislative intent.

(at p 603-604)

At the heart of the *Robideau* decision is the principle repeated in that opinion that was announced by the United States Supreme Court in *Brown v Ohio*, 432 US 161, 97 S Ct 2221, 53 L Ed2d 187 (1977), that the Double Jeopardy Clause is a restraint on the prosecution and the courts but not on the Legislature. See also *Whalen v United States*, 445 US 684, 100 S Ct 1432, 63 L Ed2d 425 (1980).

The appellee agrees that the guarantee against double jeopardy restrains the prosecution from bringing multiple charges

for the same criminal conduct as it also restrains courts from imposing multiple punishments for that same conduct. This principle applies in both single and multiple (successive) prosecution and/or punishment situations.

In *People v Nutt*, 469 Mich 565, 677 NW2d 1 (2004), this Court held that a successive prosecution for receiving and concealing stolen property brought in Oakland County did not violate the defendant's guarantee against double jeopardy where she had previously been prosecuted in Lapeer County on home invasion and theft charges involving the same stolen property. In doing so this Court overruled its previous decision in *People v White*, 390 Mich 245, 212 NW2d 222 (1973). In *White* the Court had employed the *same transaction* test announced by Justice Brennan in *Ashe v Swenson*, 97 US 436, 90 S Ct 1189, 25 L Ed2d 469 (1970), and adopted for a short time by the United States Supreme Court in *Grady v Corbin*, *supra*.

However, just as the Supreme Court rejected the *same transaction* test in *United States v Dixon*, *supra*, and reinstated the *same elements* test of *Blockburger v United States*, *supra*, this Court reinstated the *same elements* test in *People v Nutt*, *supra*. The Court employed the *same elements* test to reach its conclusion that the successive prosecution of Nutt for criminal conduct that had occurred in different locations and on different dates passed the *same elements* test and did not violate the guarantee against being twice placed in jeopardy for the same

offense.

This Court also found that the double jeopardy guarantee afforded by Article 1, Section 15 of the Michigan Constitution of 1963 was intended by the ratifiers of that constitution to be identical to that afforded by the Fifth Amendment to the United States Constitution. Justice Young wrote the opinion of the Court. In conclusion he said:

The *White* Court improperly imposed on the text of art. 1, § 15 its own notions of prosecutorial policy and, in so doing, conflated the constitutional double jeopardy protection with a self-created procedural mandatory joinder rule. Because it is clear that the ratifiers of our 1963 Constitution intended to continue to accord the same double jeopardy protection under art. 1, § 15 that was provided by the Fifth Amendment, we overrule *White* and its progeny as contrary to the will of the people of the state of Michigan. We hold that the *Blockburger* same-elements test, as the reigning test in both this Court and the federal courts in 1963, best gives effect to the will of the people in ratifying art. 1, § 15. Because the prosecution was not required to bring against defendant in a single trial all charges arising from the same transaction, and because second-degree home invasion and receiving and concealing stolen firearms are not the same offense under either art. 1, § 15 or the Fifth Amendment, we vacate the judgments of the lower courts, affirm the result reached by the Court of Appeals on other grounds, and remand the case to the trial court for further proceedings. (at pp 17-18)

The appellee submits that the state of the law of double jeopardy in Michigan is, by design of the ratifiers of the Michigan Constitution of 1963, identical to that followed by the federal courts. *People v Nutt*, supra. Further, the test to be employed is the *same elements* test. *People v Nutt*, supra, and *United States v Dixon*, supra.

The principle that the double jeopardy clause is a restraint on prosecutions and the courts but not on legislatures set forth

MICHAEL J.
CARTHY, P.C.
FIVE MILE ROAD
D, MICHIGAN 48239
TELEPHONE
13) 535-1300
FAX
13) 535-4580

in *Brown v Ohio*, supra, and *Whalen v United States*, supra, was upheld in this case by the Court of Appeals when it vacated the appellee's convictions and punishments for two counts of armed robbery and the two attendant counts of felony firearm. The appellee argued that he had been improperly prosecuted for armed robbery and larceny for the wrongful taking of the same property.

The prosecution's theory was that the defendant took money and keys from the two victims. There was no eyewitness account of the takings. The evidence to support the claims of theft was provided by the testimony of witnesses who described the property that the victims had when they saw them last or what their habits had been. (10-13b and 17-20b) There was absolutely no evidence to establish that separate takings from each victim had occurred. Nevertheless the appellee was charged with larceny as the predicate felony for the first degree murder counts as well as with a separate count of armed robbery for each victim.

The crime of larceny involves two elements, the taking of property and the intent to permanently deprive its rightful owner of that property. Those two elements are essential elements of the crime of armed robbery. This case involves multiple prosecutions and punishments for the wrongful taking of the property of another, money and keys, with the intent to permanently deprive the owner of that property. This situation does not present any exception to the double jeopardy guarantee of the Fifth Amendment to the United States Constitution or to the same guarantee provided in Article 1, Section 15 of the

MICHAEL J.
CARTHY, P.C.
FIVE MILE ROAD
D. MICHIGAN 48239
TELEPHONE
13) 535-1300
FAX
13) 535-4580

Michigan Constitution of 1963. Here the action taken in the trial court was a clear violation of those guarantees. Here also the Court of Appeals properly corrected that violation.

This case does not present a question regarding the compound nature of first degree felony murder or the punishments to be imposed therefor. The predicate felony, larceny, was not charged separately. No punishment for that crime was imposed. That is as it should be pursuant to *People v Wilder*, supra, *People v Harding*, supra, and *People v Curvan*, 473 Mich 896, 703 NW2d 400 (2005).

The question here is whether the punishments to be imposed for the armed robbery convictions in addition to the larceny predicate felony first degree murder convictions violate the double jeopardy guarantee. The Court of Appeals rejected the appellee's suggestion that the larceny/felony murder convictions be vacated which would then reduce the murder convictions to second degree murder. Instead it ruled that the proper convictions and sentences to vacate were those for armed robbery and the attendant felony firearm charges.

While the appellee stands behind and endorses his original proposal that his convictions be for two counts of second degree murder rather than for first degree felony murder he submits that the Court of Appeals' decision to vacate one of his theft related convictions for each victim was the only correct solution to the error committed in the trial court. Should this Court elect to vacate the larceny predicate felony first degree murder

convictions and reinstate the armed robbery convictions, thereby reducing his homicide convictions to second degree murder, he will have no objection.

C. Conclusion:

The proper test to apply to the question of the multiple punishment aspect of double jeopardy in Michigan, pursuant to both the Michigan Constitution of 1963 and the United States Constitution is the *same elements* test pursuant to *People v Nutt*, supra, and *Blockburger v United States*, supra. Accordingly the decision of the Court of Appeals should be affirmed in principle even if this Court should elect to vacate the appellee's larceny predicate felony first degree murder convictions and reinstate his armed robbery convictions thereby reducing his homicide convictions to second degree murder.

QUESTION NO. 2: DID THE DEFENDANT-APPELLEE'S CONVICTIONS AND SENTENCES FOR TWO COUNTS OF FIRST DEGREE FELONY MURDER AND FOR TWO COUNTS OF ARMED ROBBERY CONSTITUTE A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE DOUBLE JEOPARDY CLAUSE OF ARTICLE 1, SECTION 15 OF THE MICHIGAN CONSTITUTION?

PLAINTIFF-APPELLANT'S ANSWER: NO

DEFENDANT-APPELLEE'S ANSWER: YES

TRIAL COURT'S ANSWER: NO

COURT OF APPEALS' ANSWER: YES

The Defendant-Appellee, BOBBY LYNELL SMITH, was charged with one count each of first degree felony murder, contrary to MCLA 750.316(1)(b), and of armed robbery, contrary to MCLA 750.529, for the robbery and murder of Stephen Putman and of Richard Cummings at the City Tire Store in Pontiac, Michigan on January 7, 2003. The general information filed against him alleged that the predicate felony for the felony murder charges was larceny. (1-2b) The jury was instructed to that effect. (23a) The jury was also instructed on the charges of armed robbery. (23a)

During his opening statement the assistant prosecutor told the jury that the defendant "...was attempting to steal when he committed the murders." (9b) He explained the armed robbery charge as "...basically is that he committed a robbery with a gun." (9b) In summation he said that the armed robbery charges had been proven because the defendant admitted that he took the keys and the money. He said that the larceny element of the felony murder charge had been proven as follows:

MR. FRAZEE: Now larceny is a legal term for stealing. So, if he was either stealing or attempting to steal at the time he killed these two men, which we have shown, he is guilty of both counts of Felony Murder. (23b)

The People did not allege, nor did they argue, that the defendant took or tried to take any item of value in the robbery that was different or distinct from that taken in the larceny. The court's instruction to the jury for the crime of larceny, as the predicate felony to the felony murder charges, contained only two elements:

1. That the defendant took someone else's property without consent;
2. That the defendant intended to permanently deprive the owner of that property. (23a)

Those same two elements were included, among others, in the instruction given to the jury for the armed robbery charges. (23a)

Clearly the two theft related crimes for which the defendant was prosecuted as to each victim, larceny as the predicate felony for first degree felony murder and armed robbery, dealt with the same money and keys that were allegedly taken by the defendant. He was charged with, prosecuted for and sentenced two times for the same criminal conduct. In the Court of Appeals the appellee argued that his prosecutions, convictions and sentences constituted a violation of the guarantee against being twice placed in criminal jeopardy for the same offense.

The Fifth Amendment guarantees, inter alia, "...nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb..." U.S. Const., Am. V (not Art. V). The Michigan Constitution of 1963 states, in Article One, Section Fifteen, "No person shall be subject for the same offense to be twice put in jeopardy." Const. 1963, Art. 1 § 15.

The United States Supreme Court made the double jeopardy guarantee of the United States Constitution applicable to the states in *Benton v Maryland*, 395 US 784, 89 S Ct 2056, 23 L Ed2d 707 (1969). On the same date that it decided *Benton v Maryland*, supra, the Supreme Court issued its opinion in *North Carolina v Pearce*, 395 US 711, 717, 89 S Ct 2072, 2076, 23 L Ed2d 656 (1969). There the court cited *Benton v Maryland*, supra, which expanded the application of the double jeopardy guarantee:

"The Court has held today, in *Benton v Maryland*, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (at p 717)
(emphasis added)

See also *United States v Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

The foregoing constitutional guarantees are three of the most important aspects of the criminal law in the United States and in Michigan. The situation presented here demonstrates a clear example of a violation of this essential constitutional protection. The instant case deals with a mixture of the second and third enumerated guarantees. The defendant was convicted and

sentenced two times for the exact same criminal conduct, that is the taking of the victims' money and keys as a larceny and then as a robbery.

The most serious charges brought against the appellee were the two counts of first degree felony murder, contrary to MCLA 750.316(1)(b). That statute provides, in relevant part, as follows:

(1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

* * * * *

(b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, or vulnerable adult abuse in the first and second degree under section 145n.

(emphasis added)

The People had a choice in determining what charges to bring against the defendant. Their theory was that each of the murders took place while the defendant was committing a specific felony. That felony was armed robbery. That is what all of the evidence presented during the trial pointed to. It is what the assistant prosecutor argued. However, what was not addressed at trial is the fact that the defendant was being prosecuted twice and sentenced twice for taking the same property.

First the taking of the property was a larceny so that the People could charge the defendant with first degree felony murder. Then it was an armed robbery. If the defendant's conduct constituted an armed robbery, as the People argued, there can be

no larceny. If there is no larceny then the predicate felony element required for a conviction for felony murder has not been satisfied. At most, under this scenario, the defendant could be convicted of second degree murder, contrary to MCLA 750.317. That is because the first degree felony murder charge contains the same elements as those of second degree murder plus the requirement that the death occurred during the commission of one of the felonies enumerated in MCLA 750.316(1)(b). See *People v Passeno*, 195 Mich App 91, 489 NW2d 152 (1992), rev. on other grds. by *People v Bigelow*, 229 Mich App 219, 581 NW2d 744 (1998).

The legislative intent of a particular statutory provision is the key to determining whether one can or cannot be charged with and punished for multiple criminal violations. *People v Robideau*, 419 Mich 458, 355 NW2d 592 (1984). The test employed to determine legislative intent was set forth in *Gavireres v United States*, 220 US 338, 31 S Ct 421, 55 LEd 489 (1911). It is now commonly known as the *Blockburger* test because of its application in *Blockburger v United States*, 284 US 299, 545 S Ct 180, 76 LEd 306 (1932):

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.
(at p 304)

In applying the *Blockburger* test to the case before it in *People v Robideau*, supra, this Court stated:

If two statutes constitute the "same offense" under the

Blockburger test, it is presumed that the Legislature did not intend to allow the defendant to be punished under both statutes.

"The assumption underlying the rule is that (the Legislature) ordinarily does not intend to punish the same offense under two different statutes." *Whalen v United States*, supra, 445 US pp 691-692, 100 S Ct pp 1437-1438.

* * * * *

Although the *Blockburger* test is simply stated, it is subject to more than one interpretation, depending on the statutes involved. When one of the two statutes involved is a necessarily lesser included offense of the other, application of the *Blockburger* test will always raise the presumption that the two statutes involve the "same offense". The necessarily included lesser offense will never have an element not required by the greater offense.

(at pp 596-597)

That is exactly the situation presented here as larceny involves two elements, the taking of property and the intent to permanently deprive its rightful owner of that property, that are essential elements of the crime of armed robbery.

In *People v Harding*, 443 Mich 693, 506 NW2d 482 (1993), this Court affirmed the defendants' convictions for first degree felony murder even though they had been previously convicted for the crime of assault with the intent to murder the same victim three years before he eventually died from injuries sustained in the original assault. This Court held that the defendants' Fifth Amendment double jeopardy guarantees had not been violated because the death of the victim had not occurred at the time of the original prosecution for assault. The crime of murder was not completed until the victim died. It said:

However, the general rule of *Blockburger* does not operate without its exceptions, and, in fact, its application in recent years has been called into question in certain

circumstances. See *Brown*, 432 U.S. at 166, n. 6, 97 S.Ct. at 2225, n.6, and *Whalen v. United States*, 445 U.S. 684, 709, 100 S.Ct. 1432, 1447, 63 L.Ed.2d 715 (1980) (Rehnquist, J., dissenting).

In the present case, but for the subsequent death of the victim, it would appear that we are faced with a clear double jeopardy violation; however, because of the subsequent death, the cases are easily distinguishable. *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250. 56 L.Ed. 500 (1912), presented similar facts.

Here there was no incomplete crime as of the date of the offense, January 7, 2003. Instead we have multiple prosecutions and punishments for the wrongful taking of the property of another, money and keys, with the intent to permanently deprive the owner of that property. This situation does not present any exception to the double jeopardy guarantee of the Fifth Amendment to the United States Constitution or to the same guarantee provided in Article 1, Section 15 of the Michigan Constitution of 1963. Here the action taken in the trial court was a clear violation of those guarantees. Here also the Court of Appeals properly corrected that violation.

The prosecution's theory that the taking of the property stolen from the two victims in the case at bar could be segregated in order to accommodate its position that two separate crimes of wrongful taking had been committed (i.e. larceny and armed robbery) was creative. However it does not pass the test of constitutionality. The Court of Appeals held that the two convictions and sentences for armed robbery, and the two attendant felony firearm convictions and sentences, violated the double jeopardy guarantee of the Michigan Constitution of 1963.

(30-31a) The Court specifically found that because "...[T]here was no evidence that defendant committed separate offenses of robbery and larceny, defendant's armed robbery convictions violated double jeopardy protections." (30a)

The problem presented in this case is not nuanced. Rather it is straightforward. Larceny is a necessarily lesser included offense of robbery. (30a) Therefore the appellee can neither be prosecuted or punished twice for the single act, larceny, whose elements are contained in the crime of armed robbery.


The Court of Appeals affirmed the appellee's convictions for felony murder because it found that larceny was an appropriate predicate felony upon which to bring the first degree murder charge. (30a) Then it properly determined that the prosecution's chosen charging scheme violated the appellee's constitutional right against being twice placed in jeopardy and twice punished for the same crime. Accordingly this Court should affirm the holding of the Court of Appeals.

RELIEF REQUESTED

The Defendant-Appellee, BOBBY LYNELL SMITH, respectfully requests that this Honorable Court affirm that portion of the Court of Appeals' opinion that vacated the defendant's convictions and sentences for armed robbery and the two attendant convictions and sentences for felony firearm. In the alternative the Defendant-Appellee requests that this Court reverse his convictions for first degree felony murder and replace them with convictions for second degree murder, contrary to MCLA 750.317.

MICHAEL J. McCARTHY, P.C.

September 20, 2006


Michael J. McCarthy (P30169)
Attorney for Defendant-Appellee
26001 Five Mile Road
Redford, MI 48239
(313) 535-1300

MICHAEL J.
CARTHY, P.C.
FIVE MILE ROAD
RD, MICHIGAN 48239
TELEPHONE
(313) 535-1300
FAX
(313) 535-4580